

HONORABLE THOMAS S. ZILLY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HARMONY GOLD U.S.A., INC.,

Plaintiff,

v.

HAREBRAINED SCHEMES LLC,
HAREBRAINED HOLDINGS, INC., JORDAN
WEISMAN, PIRANHA GAMES INC. and DOES
1-10,

Defendants.

CASE No. 2:17-CV-00327-TSZ

**PIRANHA GAMES INC.'S RULE 7(g)
SURREPLY TO PLAINTIFF'S REPLY
IN SUPPORT OF PLAINTIFF'S
MOTION FOR ISSUANCE OF A
LETTER OF REQUEST (LETTER
ROGATORY) (Dkt. 93)**

Defendant Piranha Games Inc. ("Piranha") moves to strike (a) the declaration of Jessica Stebbins Bina, trial counsel for plaintiff ("Bina declaration") (Dkt. 102), which was filed along with plaintiff's Reply (Dkt. 101) in support of its motion for issuance of a letter rogatory (Dkt. 93), and (b) the portions of the Reply which rely upon the Bina declaration. All of the arguments made in the declaration and Reply could have been made in plaintiff's opening motion when Piranha would have had an opportunity to respond.

Plaintiff's strategy on this motion seems to be to sandbag Piranha. The body of the opening motion is less than one page with no supporting declaration. In reply, plaintiff presents a six page memorandum along with the Bina declaration.

The Bina declaration contains three substantive paragraphs, each of which is improper.

1 Paragraph 4 presents as fact a one-sided argument about the status of discovery — improperly and
2 inaccurately suggesting that Piranha is somehow the cause of discovery delay in this case. If the
3 Court were to consider this paragraph, Piranha would like to supplement the record to show the
4 complete discovery picture.

5 Paragraph 2 of the declaration is unsupported and misleading and should be stricken. The
6 premise of plaintiff's argument that it has standing is the allegation that it received an exclusive
7 license from its licensor, Tatsunoko, who, in turn, allegedly received those copyrights from Big
8 West. Plaintiff never credibly explains why it cannot obtain the documents it seeks voluntarily
9 from its licensor, Tatsunoko, which is allegedly "cooperative" with plaintiff ("While Tatsunoko
10 has been cooperative..."; Bina decl., ¶ 2). If, in fact, Big West transferred copyrights in the Big
11 West Characters to Tatsunoko, and Tatsunoko then transferred them to plaintiff, one would expect
12 that both plaintiff and Tatsunoko would be in possession of the documents evidencing the original
13 transfer. Yet, apparently, Tatsunoko either has no such documents, or will not release them for
14 reasons of alleged confidentiality. It is plaintiff's burden to prove a chain of copyright ownership
15 going back to the original author of the work, yet plaintiff fails to credibly explain why letters
16 rogatory are needed to get documents that, if they exist, should already be in the possession of
17 Tatsunoko. Plaintiff also fails to identify the documents it seeks.

18 Paragraph 3 of the declaration should be stricken as unsupported hearsay. Ms. Bina
19 characterizes and selectively quotes from documents which were not submitted with the motion or
20 the reply. *See Calence, LLC v. Dimension Data Holdings*, 2007 U.S. Dist. LEXIS 36235, at *8-9
21 (W.D. Wash., May 16, 2007) (granting motion to strike document "on the basis that it is irrelevant,
22 lacks foundation and contains inadmissible hearsay") (Martinez, J.); *RRW Legacy Mgmt. Grp. v.*
23 *Walker*, 2015 U.S. Dist. LEXIS 137774, at *31-32 (W.D. Wash., October 8, 2015) (same)
24 (Pechman, J.). Ms. Stebbins Bina says the agreements will be discussed further in plaintiff's
25 opposition to Piranha's pending motion for summary judgment, where the documents were filed,

1 and to that extent Piranha will address the documents in its summary judgment Reply. But Ms.
 2 Stebbins Bina's personal characterization of the documents in a declaration made in her capacity
 3 as trial counsel for Piranha is still not admissible evidence, and should be stricken. Further, the
 4 documents are irrelevant as they do not even mention copyrights or the Big West Characters that
 5 are in dispute in this case.

6 Piranha also requests that the Court strike footnote 1 on page 2 of the Reply. The footnote
 7 characterizes a company called FASA as "Piranha's predecessor" in an apparent attempt to impute
 8 FASA's views and actions to Piranha at a point in the briefing when Piranha has no opportunity to
 9 respond. FASA is not Piranha's predecessor, and plaintiff provides no evidence to support its
 10 assertion. *See Davis v. City of Seattle*, 2008 U.S. Dist. LEXIS 4429, at *44-47 (W.D. Wash.,
 11 January 22, 2008) (declining to reconsider order striking materials filed by plaintiff that were
 12 "replete with hearsay and double hearsay, as well as speculative statements and assertions lacking
 13 proper foundation") (Zilly, J.); *see also Blough v. Shea Homes, Inc.*, 2014 U.S. Dist. LEXIS
 14 100600, at *16-17 (W.D. Wash., July 23, 2014) (granting motion to strike inaccurate statements
 15 in reply brief) (Martinez, J.); *Kennedy v. AJVS, Inc.*, 2012 U.S. Dist. LEXIS 68547, at *11-12
 16 (W.D. Wash., May 15, 2012) (same) (Pechman, J.).

17 Accordingly, Piranha respectfully requests asks Court to strike the Bina declaration as well
 18 as page and line numbers 2:14-21; 4:12-17; 5:5-7; 6:15-22 and footnote 1 of plaintiff's Reply.

19 Respectfully submitted this 11th day of
 20 April, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of (1) Piranha's RULE 7(g) SURREPLY TO PLAINTIFF'S MOTION FOR ISSUANCE OF A LETTER OF REQUEST (LETTER ROGATORY) were served on the following parties, by the method(s) indicated below, on April 11, 2018.

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